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**APPENDIX C**

**1993 ARIZONA BAR ETHICS OPINION**

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OPINION NO. 93-06

May 17, 1993

FACTS:

County Y has a Public Defender's Office with a Juvenile Division. Due to numerous conflicts among defendants, the Public Defender's Office must withdraw or decline representation in a substantial number of cases. These cases must then be assigned to private attorneys who are compensated by the county.

To reduce the cost of conflict representation, the Public Defender's Office proposes that an additional component be added to the Juvenile Division. The new division would provide representation for co-defendants and other juveniles who have a conflict of interest with other clients represented by the Public Defender.

Rather than establishing a separate agency funded by the county, the Public Defender proposes that the new division would be administered through his office. The Public Defender would manage personnel matters, training, supplies and general services. The Public Defender further proposes certain safeguards to prevent the dissemination of confidential information between the separate components of the Juvenile Division and the Public Defender administrators.

Under the proposed plan, attorneys, investigators, and secretaries for the new division would maintain an office separate from the main office of the Juvenile Division and would be assigned only to the new division. The Public Defender proposes to have case files, investigative reports and other confidential information separately maintained and not accessible to attorneys in the main office. An attorney assigned to one office division would not take part in the representation of any client assigned to the other.

The Public Defender requests an opinion regarding the propriety of this plan. If the committee concludes that the plan fails to comply with the Rules of Professional Conduct, he requests guidance from the committee as to how it could comply.

QUESTION:

May the Public Defender ethically administer two divisions of the office of the Juvenile Division where the separate divisions represent clients having conflicting interests, if safeguards are established to prevent the dissemination of confidential information between the two divisions and to the administrators of the Public Defender's Office?

ETHICAL RULES INVOLVED:

ER 1.7. Conflict of Interest: General Rule

(a) A lawyer shall not represent a client if the representation of that client will be directly adverse to another client, unless:

(1) the lawyer reasonably believes the representation will not adversely affect the relationship with the other client; and

(2) each client consents after consultation.

(b) A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests, unless:

(1) the lawyer reasonably believes the representation will not be adversely affected; and

(2) the client consents after consultation. When representation of multiple clients in a single matter is undertaken, the consultation shall include explanation of the implications of the common representation and the advantages and risks involved.

ER 1.10. Imputed Disqualification: General Rule

(a) While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by ER 1.7, . . .

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OPINION:

Observance of the rules regarding conflicts between and among criminal defendants is vitally important to the entire functioning of the criminal justice system. As far back as Glasser v. United States, 315 U.S. 60, 62 S. Ct. 457, 86 L. Ed. 680 (1942), the Supreme Court recognized that conflict-free representation is a component of the Sixth Amendment right to effective assistance of counsel.



The Comment to ER 1.7 emphasizes that "[t]he potential for conflict of interest in representing multiple defendants in a criminal case is so grave that ordinarily a lawyer should decline to represent more than one codefendant." Under the Federal Rules of Criminal Procedure, the trial court is required to make inquiry with respect to any joint representation and to advise each defendant on the record of their right to separate representation. Rule 44(c), Fed. R. Crim. P. (18 U.S.C.A.) Indeed, the overwhelming majority of Public Defender Offices have rules precluding representation of more than one criminal defendant charged in the same case. See Cuyler v. Sullivan, 446 U.S. 335, 346 n.11, 100 S. Ct. 1708, 64 L. Ed. 2d 333 (1980).

The most common method of achieving conflict-free representation involves assignment of private counsel to represent those defendants whom the Public Defender cannot. As this committee observed in its Opinion No. 89-08 (October 19, 1989), "[t]he creation of 'alternative' public defender's offices is of recent origin. . . ." In that opinion, the committee dealt with a situation in which the Legal Defender, an "alternative" Public Defender who represented some of those persons who could not be represented by the Public Defender's Office because of potential conflicts of interest (typically in cases involving codefendants), sought to become the head Public Defender. The committee found that the imputed disqualification requirements of ER 1.10(b) were applicable and that "lawyers in the Public Defender's Office would be disqualified in virtually all cases that were handled by the Legal Defender's Office during the moving lawyer's tenure there, as well as all substantially related cases, provided the moving lawyer acquired material confidential information." Id. at 4. Since the moving lawyer in that case was the head of the Legal Defender Office, the committee concluded that there was an inference that that lawyer was, in fact, privy to all information about the office's clients. Of course, the imputed disqualification rule is subject to waiver by the client after consultation. See ER 1.10(d).

The instant inquiry involves a slightly different application of the imputed disqualification rules of ER 1.10. This inquiry involves not the movement of lawyers between offices, but the attempt of County Y to establish a separate juvenile division within its own office to handle conflict cases. The Public Defender indicates that this method is being selected for cost savings and attempts to justify it through safeguards to avoid leakage of confidential information between the separate divisions. Both divisions, however, would come under the supervision of the head Public Defender.

The question to be decided here is whether the imputed disqualification provision of ER 1.10(a) (which disqualifies all lawyers in a firm when any one of them practicing alone would be prohibited from representation by ER 1.7) would prevent the Public Defender from maintaining two juvenile divisions.